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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

RONALD A. GILLESPIE,

Petitioner,

v.

THE STATE OF WISCONSIN, THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF THE STATE OF WISCONSIN and THE DEPARTMENT OF EMPLOYMENT RELATIONS OF THE STATE OF WISCONSIN,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

The employment test challenged in this matter was a two-part examination. The first part of the examination was a

written essay examination with five major questions. The major questions contained subitems, or benchmarks, and the scorers of the test looked for the subitems in the essay scoring. The effect of the sub items was similar to having a larger number of questions (Tr. 1-70).

A major goal of the written part of the examination was to determine the ability of the applicants to write in standard English (Pet. App. 29A). The job experts who were gathered to prepare the examination concluded that a personnel specialist had to be able to communicate in acceptable standard English.

The group of job specialists that prepared the examination consisted of persons involved in the performance of personnel work or supervisors of persons involved in personnel work. The test was

to select a personnel specialist. The group included minorities.

The second part of the test was an oral interview. A reason for a two-part test was to eliminate persons who were clearly unacceptable, while at the same time allowing evaluation of non-verbal attributes among the group who showed minimal acceptability. The final hiring based upon the two-part test was not statistically discriminatory, and of the nine eventually hired three were minorities.

The written test was not used to rank the candidates, except for those who passed the cutoff point. The test results beyond the cutoff point did not support a prima facie case, and were not statistically discriminatory.

The test used in this instance was developed as an essay test when a previous multiple choice test, used for a similar group of personnel classifications demonstrated a disparate impact (Pet. App. 30A).

The "gardener" example for the first question of the written test, which involved writing job description specifications, was selected as a reasonably common area of activity for the applicants to discuss. The district court found that the questions were not culturally biased (Pet. App. 29A).

The defendant's test developer-experts studied and rejected other test alternatives, including multiple choice, essay only, oral only, and commercially available tests (Pet. App. 31A).

The plaintiffs failed to show that other tests without a similarly undesirable impact would also serve the employer's needs (Finding 31, Pet. App. 31A; Pet. App. 34A & 35A; Pet. App. 20A & 21A).

ARGUMENT

The petitioner contends that there is a conflict among the circuits concerning the placement of the burden of proof concerning "alternative selection" processes. Petitioners' base their assertion of conflict upon their own "subtle" interpretation of a part of a paragraph, read out of context, from Easely v. Anheuser-Busch, Inc., 758 F.2d 251 (8th Cir. 1985).

Any reasonable reading of the language in Easely must indicate that the

Eighth Circuit is in direct accord with the position of this court and of other circuits in allocating the burden to the plaintiffs, after the prima facie showing has been made and responded to by the employer, to "then show that other practices, which lack a similarily discriminatory effect, would satisfy the employer's legitimate interests." Easely, id., at 255, n. 7. In Easely, the court further noted that such a showing could be "some evidence that the employer was using the practice as a mere pretext for discrimination."

The language which petitioners assert somehow created a "subtle" shift in the allocation of the burden, is from page 256 of the Easely decision. That language is in a paragraph that begins

with a recitation of the findings by the district court that the employer had "failed to demonstrate that the test was a valid selection device that was justified by a business necessity. ..."

Footnote 7, noted previously, is referenced to the same paragraph. Read in context, it is clear that the Eighth Circuit did not make some "subtle" shift in the law governing the burden of proof in disparate impact cases, and/or the burden of showing the availability of alternative test devices. Easely holds that once business necessity has been demonstrated, as it was here, the plaintiff has the right to show that the necessity was simply a pretext, and may seek to make such a showing using indirect proof, i.e., that the employer had other similar alternatives that could have been used. The process set forth by

this court in Albermarle Paper Co. v. Moody, 422 U.S. 405, 446-447 (1975), and cited in Easely, i.d., 255, describes the burdens of going forward and does not alter the burden of proof of discrimination which remains on the plaintiffs. And whatever "showing" is made is evidentiary in nature to be considered and weighed by the trier of fact. In Easely, the Eighth Circuit was reviewing district court findings which included findings that the employer had faled to perform a proper job analysis or validate the tests used. The additional finding that the employer in Easely had an available selection device was not necessary to the ruling; it was however some evidence to sustain the lower courts finding of discrimination.

Moreover, unlike this case, the plaintiffs in Easely had identified not

only a specific selection method but had proven to the satisfaction of the district court that the alternate selection process did not in fact produce a statistically disparate effect in actual hiring experience. Easely v. Anheuser-Busch, Inc., 572 F. Supp. 402 (E.D. Mo. 1983) at 410, Finding 36.

Contrary to Petitioner's contention, it is appropriate that the complainant have a burden of doing more than merely making a "bare assertion" of an alternative method of testing (Pet. App. 20A) in order to show the availability of an acceptable alternative selection device. While one might hesitate to promote the "alternative" method described in Easely (hiring solely on the basis of a review of applications and one or more interviews, Easely at 410) it included at least a specific example and

supporting data on the actual effect of a specific example.

As both the district and circuit courts held here, this petitioner did not make a similar showing.

Petitioners contend that the circuirt court holding would require the complainant to "validate" an alternative test in order for it to be considered. It is not necessary to determine if a plaintiff is required to "validate" alternative selection device. In this instance the plaintiffs fell far short of any arguable level of proof. The circuit simply agreed with the district judge that a "bare" assertion was not sufficient to constitute a showing of a reasonable alternative. The court of appeals observed that not only hadn't the petitioners presented a specific test,

but they had also failed to present any data to show that such an alternative would meet the needs of the employer and not produce disparate results.

I. The Petitioner Failed To Show An Alternative Selection Device.

This court has clearly held that the burden of proof remains upon the plaintiff to show that other selection devices without a similar discriminatory effect would also serve the employer's interest. Dothard v. Rawlinson, 433 U.S. 321 (1977); Albermarle Paper Co. v. Moody, at 425. In this case, the plaintiffs did not present any testimony of any other specific test or alternative procedure that would not have presented an equal risk of a disparate statistical result. The petitioner's witness

testified only in general terms that other, unspecified tests could have been created, and that other, also unspecified tests might be available commercially. The employer's experts testified that the test here was developed because a prior multiple choice test showed a disparate impact; that the essay test had the characteristics of a multiple choice test by having separate internal items or "benchmarks"; and that they had rejected commercial tests. Thus, even if it is assumed that the Eighth Circuit decision, read "subtly" constitutes a conflict among the circuits, the petitioners have failed even to fit that language alluded to, that "an alternative selection procedure" which did not have the same adverse impact was available. Petitioners' expert did not make such a

showing, and the district court found that the employer's experts, who were test preparers, had "shown" other alternatives to be unsatisfactory (Finding, Pet. App. 31A).

It was the function of the district court to evaluate the testimony of the witness, including the experts, and to determine the facts. The district did so. As this court has recently held in Anderson v. Bessemer City, ___ U.S. ___, 84 L. Ed. 518 (1985), it is not the function of the appellate courts to intrude into the findings of the district court.

II. The Employer Considered Alternative Testing Procedures.

Petitioners also misconstrue the concept of the "alternative testing"

procedure. The EEOC guidelines do not require that an employer use any alternative that is arguably available, but that an employer consider alternatives. 29 C.F.R. § 1607.3 (1979). In instances such as here, where tests may not be reused for security reasons, or at a minimum would have to be substantially rewritten, the statistical impact of a particular test may not be determined until after the test has been administered. No employer can guarantee that a test will not demonstrate a statistically disparate impact. In fact the testimony indicated that in an imperfect society, a test that truly measures job skills such as skill in writing standard English, may frequently show a disparate impact. That result is not the fault of the test, but a

reflection of reality. The employer's obligation is to consider other alternatives in the test planning stage, and that was done here.

The content validation approach, which is permissible, often uses job simulations as a testing mechanism. In this instance the essay format functioned as a demonstration of the ability of a personnel specialist to actually prepare a job description, a primary element of the personnel work.

The cost of commercial examinations is one of the valid criteria an employer may consider Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir. 1971). Commercial examinations that are expensive and do not fit the employer's needs need not be used. A mere general assertion that there are commercial

examinations in the area is not a showing of an alternative that would fit the employer's needs.

The circuit court properly accepted the district court's findings of fact that the plaintiffs had not shown other tests would also serve the employer's interest, and properly accepted the finding that the employer had studied alternatives and rejected the alternatives for legitimate reasons.

An employer is not required to use only a test that does not show a disparate impact. The employer's interests are primarily in selection of persons most able to do the work, not in the least discriminatory work force. To effectuate this goal an employer may use a test that is reasonably aimed at achieving this goal without prejudice.

Where a test is a job simulation, as here, and where it is not likely to be used again, the employer can only consider other test approaches, not guarantee that a particular test will not show a disparate impact. Stated otherwise, an employer is not required to use a standardized test to determine present job skills, such as writing.

The statistical impact could only be determined only after the test was scored. If the test has been professionally developed in accordance with the EEOC guidelines for the development of content validated tests, as held here, and if the employer considered other alternatives in the development process, then the employer may hire on the basis of the test result even if the result showed a disparate

impact. Otherwise, an employer would be effectively forced to use standardized tests. The employer could not be assured in advance that a particular job simulation would not show a disparate impact at any particular instance. Indeed even standardized tests may, produce a disparate result at any particular testing.

The employer was aware of the disparate statistics prior to setting the cutoff point. The employer's purpose required the use of both parts of the test. The employer's options were to use the test as given, or to develop a new test and start over. As the court of appeals found, the cutoff point was set to bring into the interview process as large a percentage of minorities as

possible, while still serving the cut off function (Pet. App. 18A).

The "alternative" must also serve the employer's legitimate interests which include factors of selection, administration, and cost. In Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), this Court noted that an employer need not adopt a hiring process that meets some court's standard of the "'best' hiring procedures."

In this case the test was properly developed, properly adminstered, and reflected the professional experience of the employer with a prior multiple choice test that had showed a disparate impact, for a similar position. Contrary to the petitioner's contention, there was a basis for the district court's finding, specifically sustained by the court of

appeals, that a previous test had shown a disparate impact (Pet. App. 20A; 30A).

The district court found that the test had been developed in accordance with the EEOC guidelines, and that there was no evidence to indicate that other tests within those guidelines would have eliminated the disparate impact and meet the legitimate employment objectives of the employer. Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981).

The district court found that the employer had studied other alternatives and had rejected those alternatives for legitimate reasons, and held that the employer did not forsee that the test used would have a disparate impact.

The affirmative showing by the employer that the test chosen was itself an "alternate," dispels any suggestion

that use of this form of test--was a mere pretext to discriminate.

There is no conflict among the circuits that a plaintiff has the burden of showing that other alternatives would meet the employer's legitimate objectives and not have a disparate impact.

III. The Allocation Serves The Purposes Of Title VII.

Petitioners assert that the burden of proof allocation, adopted by this court does not satisfy the interests of Title VII. The interests of Title VII include the employer's interests in reasonable selection processes to hire the most qualified employes available. Since the district court decision in Crockett v. Green, 388 F. Supp. 912 (E.D. Wis. 1975), this court decided Albermarle Paper Company v. Moody, 422 U.S. 405 (1975), and the EEOC guidelines were

altered to remove the impossible burden alluded to by the district court in Crockett, Id. See Contreras v. City of Los Angeles, id.

The proof allocation serves the purposes of Title VII.

CONCLUSION

This petition does not present any substantial federal question. The allocation of the burdens of proof and burdens of going forward used by the district and circuit courts in the decisions below were in direct accord with the rulings of this court and federal circuit courts.

There is no conflict among the circuits about the amount of evidence necessary to establish a showing of a reasonably available selection mechanism, and the record and findings support the

district and circuit court rulings that this petitioner had failed to make such a showing.

Respectfully submitted,

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